1896

The Use of Streets by Gas and Electric Light Companies

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THE USE OF STREETS BY GAS AND
ELECTRIC LIGHT COMPANIES.

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Thesis presented by
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for the Degree of LL. B.

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Cornell University
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1896.
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INTRODUCTION

To assert that artificial light is an essential of life would be to exalt its importance, yet it may be justly regarded as a necessity of modern civilization. Gas and electricity are generally used for lighting purposes in all large towns and cities, and as it is practically impossible for the ordinary individual to economically manufacture the gas or electricity which he requires, the business naturally is in the hands of companies which, owning extensive establishments, supply the wants of all citizens. To distribute the gas or electricity from the place of manufacture or generation to the various places of consumption requires the use of the public streets. It is this use of the streets that will be briefly discussed in the following pages. No new principles of law have been evolved in the efforts of courts to define the rights and liabilities of gas and electric companies in the premises, but familiar rules have been fitted and applied to novel conditions. Hence any extended examination of settled principles would be a work of unprofitable supererogation, but an attempt will be made to illustrate the manner in which those principles have been applied to the subject.
LEGISLATIVE CONTROL OF STREETS.

The legislature as representative of and trustee for all the people, has full control over the streets, and consequently may authorize acts to be done therein which would otherwise be nuisances. In the absence of constitutional restrictions the power of the legislature in this respect is practically unlimited. One of the salutary restraints upon legislative power, common to all of our states, is that private property shall not be taken except upon compensation being made to the owner. So while additional uses of streets may be authorized which do not subvert or substantially impair the original uses, yet the right of the abutting lot owner to enjoy the street as a means of access to his property cannot be materially abridged without compensation being made for the deprivation.

The abutting lot owner has peculiar rights in the street which are not common to the public generally, embracing the right of free access to his premises, and the free admission and circulation of light and air to and through his property. If these rights are taken away or impaired the abutter is entitled to such damages as he may have sustained by reason of the diversion of the street from the uses for which it was originally taken or dedicated, and its appropriation to other and inconsistent uses.


(b) Lahr v. Metropolitan El. R. R. Co., 104 N. Y. 291.
The primary purpose of a street is for the passage of the public, and all inconsistent uses must be exercised in subordination of the original design and purpose. No person can acquire a right to make a special or exceptional use of a public street not common to all citizens of the state, except by grant from the sovereign power. Thus the right to use streets for the purpose of laying gas pipes therein or erecting electric light poles and wires thereon, is a right which can only be conferred by the legislature, either directly or indirectly. If a company uses the streets for these purposes without a legislative grant it is guilty of a nuisance, and subject to indictment, and also liable to the adjoining lot owner and all others who sustain special damages.

The state by granting a franchise to erect poles or lay pipes in streets does not abdicate its control over the streets, or curtail its police powers, nor does the state absolve itself from its primary duty to maintain the streets in a safe and proper condition for public travel and other necessary street uses.

(c) Norwich G. L. Co. v. Norwich City G. Co. supra; Commonwealth v. Boston, 97 Mass. 553; Young v. Yarmouth, 9 Gray 386.
(d) American Rapid Telegraph Co. v. Hess et al, 125 N. Y. 641; People v. Squire, 107 N. Y. 593; Roanoke Gas Co. v. City of Roanoke, 88 Va. 810, 14 S. E. 665.
FRANCHISES GRANTED BY CITIES.

"As the highways of a state, including streets in cities, are under the paramount and primary control of the legislature, and as all municipal powers are derived from the legislature, it follows that the authority of municipalities over streets and the uses to which they may be put depends entirely upon their charters or the legislative enactments applicable to them. It is usual in this country for the legislature to confer upon municipal corporations very extensive powers in respect to streets and public ways within their limits and the uses to which they may be appropriated." The wisdom of delegating the control of the streets to the municipality is obvious, as the municipality is in a better position to understand the improvements needed, the safeguards required, and the exigencies to be encountered, but the delegation must plainly appear by express grant or necessary implication.

The legislature may grant the municipality most extensive powers, making it a miniature state within its locality, or it may deprive it of every power, leaving it a corporation in name only.

Where the legislature has delegated the control and regulation of streets to a municipality, the latter may lawfully permit any use of the streets which is consistent with the objects for which they are held, and may grant the privi-

(a) Dillon, II Mun. Corp., Sec. 680.
(c) Domestic Telegraph Co. v. Newark, 49 N. J. Law 344.
(d) Barnes v. District of Columbia, 91 U. S. 545.
lege of laying gas pipes and mains therein, but the munici-
(b) pality has power to grant the privilege only so far as the
sovereign power has referred the matter to it for its consent.
As the legislature, representing the public, may, as we have
seen, restrict the public use of a street, it may confer pow-
er upon a municipality to authorize the erection of electric
light poles and the stringing of wires in the streets within
its limits, and this power may be inferred from the power to
regulate and control the streets. Whether this power may be
validly exercised without making compensation to the abutting
owner is a matter upon which various views are entertained,
and its determination depends upon the question of whether or
not the erection of poles in the streets is considered as
consistent with street uses.

As a municipality may only exercise such powers as
are conferred upon it by the legislature, a grant of the
right to erect poles and wires or lay pipes in the streets is
void, without legislative authority; nor can any rights spring
from such grant because the city authorities acquiesce in the
use of the streets, and money is expended on faith of the
grant, for a city is a trustee of the streets for known spec-

(a) Chicago Municipal G. L. Co. v. Town of Lake, 130 Ill. 42.
(b) City of Brooklyn v. Jourdan, 7 Abb. N. C. 231.
(c) W. U. T. Co. v. G. & S. El. L. Co., 46 Mo. App. 120.
(d) See "Electric Light Poles Additional Servitude", p 27,infra; Metropolitan Telephone & Telegraph Co., v. Colwell
Co., supra.
(e) Richmond G. L. Co. v. Middletown, 59 N. Y. 232.
(g) Brush etc. Co. v. Jones Bros. etc. Co., supra.
ific uses, and a company dealing with it is bound to take notice of its power to alien or encumber the trust property.

Where a city has the power under its charter to construct and maintain gas works, it may contract with others to supply gas, and the implication seems reasonable that it may by contract give the gas company the right to lay its pipes in the streets and keep them there for a number of years.

The fact that the general statutes under which a gas company was organized authorize corporations formed thereunder to exercise all the powers necessary to carry into effect the objects for which they are created will not empower the company to lay pipes in the streets of a town whose charter gives the town authorities the power to control and regulate the streets without the consent of such authorities.

Where the location of poles is left to the discretion of the city authorities, the courts will not interfere to compel them to designate locations upon their refusal to act. And where a company has not received a necessary permission to use the streets for the purpose of stringing its wires, it cannot evade the statutes by selling or giving the wires in the streets to its consumers.

LAMP POSTS:

Where a city has control over its streets it may

(a) Elster v. Springfield, 49 Ohio St. 97.
(b) City of Newport v. Newport L. Co., 84 Ky. 166.
(d) Chicago M. G. L. & F. Co. v. Town of Lake, 130 Ill. 42.
permit the erection of lamp posts at suitable places for the purpose of lighting the same at night, as this is a use perfectly consistent with the public easement. The streets are thus rendered more safe and passable at night, and the public convenience subserved. But the right to lay and maintain gas pipes does not carry with it as a necessary incident the right to erect and maintain lamp posts at the street corners.

**QUASI PUBLIC CHARACTER.**

**GAS COMPANIES:**

The manufacture and distribution of illuminating gas by means of pipes laid in the public streets may be considered as a business of a public character, and the use of the streets as a franchise emanating from the state. The franchise is conferred for the benefit of the public as well as of the company. The company owes duties to the public and it cannot sell, assign, or lease its privileges without consent of the legislature, nor will a court of equity compel specific performance of a contract whereby a gas company agrees to abandon the discharge of its duties to the public and not thereafter engage in business in a certain portion of a city. Yet it does not serve such a public use as to exempt it from the exercise of the right of eminent domain. However,

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(a) Roche v. Milwaukee G. L. Co., 5 Wis. 55.
(b) New Orleans G. Co. v. Hart, 4 So. (La.) 215.
(c) Chicago G. L. & C. Co. v. Peoples etc. Co., 121 Ill. 530.
(d) Bath G. L. Co. v. Claffy, 74 N.Y. 638.
Brunswick G. L. Co. v. United etc. Co., 85 Me. 432.
(f) N. Y. C. etc. R. R. Co. v. Metropolitan G. L. Co., 63 N. Y. 326.
it has been held by other courts that gas companies are not
quasi public in their nature, where they are under no obliga-
tion to manufacture or sell gas, and where no public duties
are imposed upon them. The business is not regarded as a
prerogative of the state, but is open to all, and may be car-
ried on by any person without legislative authority.

**NATURAL GAS COMPANIES:**

The business of companies incorporated for the pur-
pose of conducting and supplying natural gas is generally
considered as a business involving public duties and benefits
sufficient to justify under statute the exercise of the right
of public domain in their behalf.

**ELECTRIC LIGHT COMPANIES:**

Electric light companies are quasi public corpora-
tions being engaged in a business involving public duties and
obligations.

**ASSIGNMENT OF FRANCHISE.**

The power of a company to assign its franchise to
use the streets will not frequently arise for determination,
inasmuch as such grants are usually made to include "success-
ors and assigns". But in the absence of words conferring a
right of alienation, the permission of a city to a gas company

(b) Jersey City G. Co. v. Dwight, 29 N. J. Eq. 242.
(c) B. & R. Nat. G. L. Co. v. Richardson, 63 Barb. 437.
Consumers Gas Trust Co. v. Harless, 131 Ind. 146.
(d) Edison United Mfg. Co. v. Farmington etc. Co., 82 Me. 464.
to lay pipes in the streets is not such a negotiable right as (a) the company may assign without city's consent. A receiver of a company, however, succeeds to its rights, and may proceed (b) under the consent given to the company. But if the legisla-
ture has granted the right to lay pipes subject to the con-
sent of the city and that consent has been obtained, the com-
pany becomes vested with a right to use the streets as a franchise conferred by the state, and may mortgage it. If
the mortgagee foreclose, the franchise, he may organize a new company and enter upon the enjoyment of the franchise without (c) farther permission from the city. For the power to mortgage rights, privileges and franchises, in order to make it avail-
able, and to render the security valuable, vests the mortgagee with power to foreclose. Consequently, a purchaser at a
foreclosure sale acquires the rights and privileges of the original company, subject, of course, to the same terms and conditions. And upon such foreclosure the municipality has (d) no authority to forfeit the rights of the mortgagee.

EXCLUSIVE PRIVILEGES.

MONOPOLIES:—

Monopolies are favorites neither with the courts

(b) City of Brooklyn v. Jourdan, 7 Abb. N. C. 23.
(c) City of Brooklyn v. Jourdan, supra.
nor the people. They are regarded as encroachments upon the people's rights, as iniquitous engines of extortion, and as clogs upon the wheels of commerce. Especially repugnant to republican sentiments, their creation is not uncommonly prohibited by State Constitutions. In the absence of such prohibition, however, the legislature has the power to confer exclusive privileges upon gas and electric companies to use the streets for their respective purposes, which grants are valid and will be upheld by the courts. The inherent nature of these privileges is such that they cannot be shared by all, and the grant abridges no right of the individual. These privileges confer upon one the right to do that which before no one had a right to do. Timid capital may be thus induced to invest in undertakings of doubtful profit, and the public comfort and convenience be subserved. But exclusive rights should be granted with caution, especially when streets have sufficient width and capacity to accommodate more than one public enterprise without unduly obstructing public travel, for competition is potent in securing the people from exaction.

The exclusive privilege, where the State Constitution does not prohibit, may be granted by the legislature, either directly or indirectly, through the municipality. It is for the legislature to decide, whether the privilege shall be exclusive or not.

(b) State v. Cin. G. L. & C. Co., 18 Ohio St. 262; State v. Mil. G. L. Co., 29 Wis. 454; People v. Bowen, 30 Barb. 24.
The Supreme Court of the United States has sustained grants of exclusive privilege on the ground that they are made in consideration of money to be expended, and important services to be rendered for the promotion of public comfort, health and safety, and upon the same principle that a state can grant an exclusive privilege to construct a railroad, to maintain a bridge, or to operate a ferry. Nor is such grant in conflict with a constitutional provision "that no men, or set of men, are entitled to exclusive, separate public emoluments or privileges from the community except in consideration of public services."

Although the state may grant exclusive privilege to use streets for laying pipes, a grant of an exclusive privilege of making and vending gas would fall within a constitutional prohibition forbidding the grant "of any exclusive privilege hereditary or otherwise."

Yet it has been held that the grant of an exclusive privilege by a city, afterwards confirmed by a legislative amendment to grantee's charter, was merely a license, which would protect the licensee from prosecution for digging up the public streets for the purpose of laying pipes, but that so far as the grant attempted to confer any exclusive privilege it was ineffectual, being made without valuable consideration.

(c) St. Louis G. L. Co. v. St. Louis G. F. etc. Co., 16 Mo. App. 52.
CONSTRUCTION OF EXCLUSIVE GRANTS:

It is a rule of construction that statutes creating monopolies shall be construed strictly against the grantee. The natural rights of the people are not to be taken away by implication, and he who asserts an exclusive privilege in derogation of these rights must establish it by convincing proof. So where an exclusive grant is made, the courts will not assume that the people intended to bind themselves to old methods, and exclude themselves from participation in the benefits of new discoveries and inventions. Thus an exclusive right to lay pipes in the streets, for supplying artificial gas will not exclude a company supplying natural gas, and a grant, made before the introduction of electricity for economic purposes - giving a gas company an exclusive privilege to manufacture and supply gas, or light and heat "by any other means", will not be held exclusive as against an electric light company proposing to use the streets for the purposes of its business. And assuming that an exclusive grant can be made to a gas company, such grant is not impaired by a subsequent grant to an electric light company.

EXCLUSIVE GRANTS BY CITIES:

Attempts to grant exclusive privileges are sometimes made by municipalities, but without an express delegation of power by the legislature, such grants are invalid,

(a) City of Newport v. Newport L. Co., 89 Ky. 454.
municipalities having no inherent power in the premises. The (a)
power of a city to make such grant must be free from doubt, (b) and it will not be implied from an authority in the charter (c) to cause the streets to be lighted. The mere fact that a (d) city ordinance specifically and by name grants the right to lay pipes or erect poles in the streets does not thereby make the license exclusive. The right to grant other licenses remains unrestricted, to be exercised at the discretion of the (e) city, and although a company has used the streets for a long period of time to the exclusion of all others, the courts (f) have power to inquire into the validity of such exclusive use.

But where a municipality is under obligation to light its streets, and to furnish its inhabitants with the means of obtaining gas at their own expense, it has implied power to contract with others to furnish it, and therefore a contract giving an exclusive privilege to a company is valid. For in such case the contract is made under the direction of the sovereign power, and the object is the performance of a public duty. A contract of this character is inviolate and is controlled by the general principles of all contracts.

**VOID GRANT OF EXCLUSIVE PRIVILEGE:**

A void grant of an exclusive privilege, being in the nature of a license, will protect the grantee from prosecution

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(a) Citizens G. & N. Co. v. Elwood, 114 Ind. 332.
(b) State v. Cincinnati G. L. Co., 19 Ohio St. 262.
(d) City of Rushville v. Rushville N. G. Co., 22 N. E. 683.
(e) Crowder v. Town of Sullivan, 123 Ind. 436.
(g) City of Newport v. Newport L. Co. 54 Ky. 186.
for the commission of a public nuisance in digging up the streets for the purpose of laying pipes, yet it does not give the grantee such rights as will permit it to restrain another company from laying pipes, provided its pipes are not thereby disturbed. And in the case of a void grant of an exclusive privilege to one company, another company is not justified in digging up the streets and laying pipes therein upon the refusal of the municipality to grant it special privileges.

THE GRANT OF AN EXCLUSIVE RIGHT IS A CONTRACT:

When the legislature grants an exclusive right to supply gas to a municipality and its inhabitants through pipes and mains laid in the public streets, it grants a franchise vested in the state, the consideration of which is the performance of the service by the grantee, and after such performance, the grant becomes a contract protected by the Constitution of the United States from subsequent state legislation impairing its obligation. Such contract, however, is subject to the exercise of the ordinary police powers of both state and municipality. But if it is one of the express conditions of the grant that the legislature may alter or revoke it, a law which alters or revokes it, or which has the effect to alter or revoke the exclusive character of the privilege, cannot be regarded as impairing the obligation of the contract, however harshly it may operate.

(a) City of Quincy v. Bull et al, 106 Ill. 337.
(c) Citizens G. & M. Co. v. Elwood, 114 Ind. 332.
(e) Hamilton G. L. Co. v. Hamilton City, 146 U. S. 270.
INVASIONS OF EXCLUSIVE PRIVILEGES:

Where a company is vested with an exclusive privilege, injunction is the proper remedy to prevent the city which has granted such privilege from conferring like privileges upon others. But applications for injunctions have been denied under similar circumstances on the ground that an injunction would be an unwarrantable judicial interference with the legislative functions of a city, and that the courts could not interpose to arrest the passage of the obnoxious ordinance, although they were open, after its adoption, for the purpose of testing its validity. However, where a company actually threatens, under an illegal grant from a municipality, to invade an exclusive privilege possessed by another company, a court of equity will enjoin the threatened action. No one can attack the constitutionality of the grant of an exclusive right or privilege unless he asserts a similar conflicting one. The complainant must show that the pretensions of the one asserting the exclusive privilege are depriving him of some right.

RIGHT TO USE STREETS A CONTRACT.

When a gas or electric light company has received a grant of authority to use the streets, whether such authority is given by the legislature alone, or by the legislature and

(a) City of Newport v. Newport L. Co., 84 Ky. 166.
(b) Des Moines G. Co. v. City of Des Moines, 44 Ia. 55; Montgomery L. Co. v. City of Montgomery, 87 Ala. 245.
(c) Montgomery L. Co. v. City of Montgomery, supra.
the municipality, the company by accepting and acting upon such grant acquires a vested interest in the streets for the term indicated in the grant. The grant becomes a contract which cannot be violated by either the municipality or the state. This principle of law is of the utmost importance when municipalities seek to repudiate grants previously made. It is therefore impossible for a city to alter the essential terms of a grant without the consent of the grantee.

Until accepted or acted upon, an ordinance granting the privilege of using the streets is a revocable license, but when it is acted upon in a substantial manner involving the expenditure of money, it becomes a binding contract, and ceases to be a mere license revocable at the pleasure of the city council.

The acceptance need not necessarily be in writing; the purchase of land or outlay of money upon faith of the grant is sufficient to perfect the contract between the municipality or state and the company.

As a general rule, the designation of streets by a city gives the company an irrevocable right to use those streets. The city council cannot at its mere will annul the ordinance which authorized the occupation of the streets, and leave the company's property impressed with the character of

(a) Cook, Stock & Stockholders, Sec. 913.
(c) Chicago M. G. L Co. v. Town of Lake, 130 Ill. 42.
a nuisance, which can at once be abated, and thus destroy the
(a) company's business. The right of a gas company, under its
charter, to lay pipes in the streets, becomes an easement
when exercised, and is similar to the right of a railroad
(b) company to build and occupy its road. A stipulation in a grant
from a city, that it shall be subject to all ordinances
thereafter passed, does not convert the grant into a mere
revocable permit. The condition assumes the continuance of
the original grant and subjects it only to regulations and
modifications consistent with and not subversive of the ori-
(c) ginal grant. The grant of an exclusive privilege may be a
(d) contract, which cannot be impaired by subsequent grants.

CONTRACT IS SUBJECT TO POLICE POWERS:

But the contract, whether conferring an exclusive
privilege or not, is subject to the exercise of the ordinary
police powers of the state and the municipality, even though
(e) these powers are not expressly reserved, and whatever may be
the exact boundaries of these powers, there seems to be no
doubt but that they "extend to the protection of the lives,
health and property of the citizens, and to the preservation
of good order and the public morals. The legislature cannot,
by any contract, divest itself of the power to provide for
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(a) Hudson Tel. Co. v. Jersey City, 49 N. J. L. 303; Common-
(b) Providence G. Co. v. Thurber, 2 R. I. 15; People v. Mut-
(d) New Orleans G. Co. v. L. G. Co., 115 U. S. 650; Louis-
ville G. Co. v. Citizens G. Co., 115 U. S. 683; City of
Newport v. Newport Light Co., 84 Ky. 166.
337; Crowder v. Town of Sullivan, 128 Ind. 486.
these objects. They belong emphatically to that class of objects which demand the application of the maxim, *salus populi suprema lex*: and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself."

An annual charge or rent for each pole is not a valid exercise of police power, but a fee charged for the purpose of defraying the actual costs of municipal inspection is within those powers. Under the police power is included the right to compel removal of pipes and poles which offer obstruction to the progress of street improvements; whether the police power extends to the regulation of the prices which companies may charge to consumers is a mooted question and is hereafter discussed.

OBLIGATION TO SUPPLY.

In the absence of a controlling statute, the courts of the different states are not agreed as to the existence of any obligation on the part of gas and electric light companies to supply gas or electricity to those persons residing along the lines of the pipes and wires, who have made all necessary preparations to use the light, and who are willing to comply with the reasonable regulations of the company.

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(a) Beer Co. v. Massachusetts, 97 U. S. 25.
(d) See "Changing Location of Pipes and Poles, p. 29.
(e) Page 21, infra.
One view is that no public duty is imposed upon the companies, and that they cannot be compelled to make or sell gas or electricity to anyone: nor are they bound to serve the public any farther than a consideration of their own interests may impel. The business does not subject those who may choose to engage in it to duties or liabilities from which manufacturers of other commodities are exempt by the ordinary rules of law.

But the weight of authority appears to affirm the existence of a duty to supply the reasonable demands of the public, and this seems, on principle, to be the better view. The companies enjoy valuable franchises conferred by the state and city; they are occupying public streets for private purposes, and the consideration of these privileges is the obligation to supply, under reasonable regulations, the requirements of all citizens who have made arrangements to receive the light, and are willing to pay or furnish security for the payment of that which they may consume. From the very nature of the business, the companies have, in a limited sense, monopolies, which ought to be tolerated only upon their assumption of compensatory duties to the public. Certainly, where the company has an exclusive privilege, a greater obligation is imposed, and no fanciful or capricious reason should

(b) Paterson G. L. Co. v. Brady, 27 N. J. L. 245.
excuse the company from serving those who may apply to it.
Where a company disregards its obligation and refuses to sup-
ply, it may be compelled to do so by writ of mandamus.

REGULATIONS APPLICABLE TO CONSUMERS:

The regulations prescribed by company, the due ob-
servance of which may be conditions upon which light is furn-
ished, must be reasonable, as where they are designed and
adapted to secure safety in use, to provide for inspection,
and to protect the company itself from fraud. As it is mani-
festly impossible to demand and insist upon payment at the
time the gas or electricity enters the consumer's pipes or
wires, the company may require a reasonable deposit to secure
itself from the consumer's possible default. It is a reason-
able regulation to require the application for supply to be
in writing and to state the number of burners which it is
proposed to be used, but a requirement that an applicant
shall pay the debt of a former owner of his building is op-
pressive and illegal. The secretary and general manager of a
company may waive its regulations, and if a rule of the com-
pany requires that an application should be in writing, and
an oral application is refused for other reasons, the company
cannot afterwards justify its refusal on the ground that the
application was not in writing.

(a) Shepherd v. Milwaukee G. L. Co., 6 Wis. 526; Gas L. Co.
v. Colliday, 25 Md. 1; New Orleans G. & B. Co. v. Pauld-
ing, 12 Rob. (La.) 378.
(b) Portland Natural G. & O. Co. v. State, 135 Ind. 54.
(d) Shepherd v. Milwaukee G. L. Co., 11 Wis. 243; s. c. 15
Wis. 349.
(f) Shepherd v. Milwaukee G. Co., supra.
A gas company, however, is not under any obligation to supply meters to those who have discontinued the use of gas, and who are using electricity supplied by another company. The meters being desired, so that gas might be resorted to in case of any interruption in the supply of electricity.

The entire matter of this duty to supply is now regulated by statute, with more or less detail, in a large number of the states.

STATE AND MUNICIPAL REGULATION OF PRICES.

An inquiry as to the power of a state or municipality to regulate the prices of gas and electricity, when such power is not reserved in charter or franchise, is one both important and difficult. If we keep in mind the wide diversity of opinion as to whether these companies are of a public character, and as to their duty to furnish gas and electricity to those desiring them, it is not surprising to find discordant views upon the power to regulate prices.

If the business of supplying gas and electricity be regarded as an ordinary manufacturing business, and the companies as owing no particular duties to the public, free to deal or not to deal with the citizen as policy or caprice may suggest, and independent and unrestrained except by the terms of their charters, then the power to fix prices may well be

(a) Fleming v. Montgomery L. Co., 100 Ala. 557.
(b) See p. 18.
doubted, unless we are prepared to admit that the legislature
may regulate, at its pleasure, prices in all businesses.

On the other hand if it be regarded as a public
business, it may be argued that the companies engaged in it
thereby, in effect, grant the public an interest in it, and
tacitly agree to submit to regulation for the public good.
It is not hastily to be presumed, especially in cases of mo-
nopolies, that the legislature intended to exempt the busi-
ness from public control in respect to the terms upon which
it should discharge its duties to the public, and the pre-
sumption yields only to the express terms of the charter.

Thus where the right to fix its own prices is not expressly
conferred by the charter of a company, the prices may be reg-
ulated by the city council, and it has been held that the
power of a city council to provide reasonable regulations for
the safe supply, distribution and consumption of gas within
the limits of a city, includes the power to fix the maximum
rates which may be charged by a company doing business within
the city.

Where the city council has power to regulate prices,
the power should be reasonably and fairly exercised. If the
council fraudulently fix a price, which they know is less
than the cost to manufacture, the price so fixed is not bind-
ing upon the company.

Where the power of regulation is denied, the deci-

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(a) State v. Columbus G. L. & C. Co., 34 Ohio St. 572.
(b) City of Zanesville v. Zanesville G. L. Co., 47 Ohio St. 1.
(c) City of Rushville v. Rushville N. O. Co., 28 N. E. 853, (In
(d) State v. Cincinnati G. L. & C. Co., 16 Ohio St. 262.
ions proceed upon the theory that the right of the companies
to fix their own prices is an inevitable incident of the char-
tered right to engage in the business, and while the power of
a company to fix its own prices is implied, it nevertheless
exists, and is as much a part of the charter as if expressly
stated therein. Any attempt, therefore, to regulate prices
would be an attempt to impair the obligation of a contract,
and contrary to the Constitution of the United States. Such
attempts cannot find shelter within the police power of the
state, not being regulations intended to promote the comfort,
safety or welfare of society. A corporation cannot be de-
prived, under the guise of regulation, of valuable rights and
privileges conferred by its charter. The charter being a
contract between the state and the corporation, which vests
in the latter an absolute right to fix its own prices, such
prices cannot be diminished by subsequent legislation, state
(a)
or municipal.

The power of a municipality to regulate its streets
does not ordinarily include the power to regulate the charges
of telephone, gas and electric companies using those streets.
Such power must be expressly conferred upon the municipality
(b)
by the legislature.

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(a) State v. Laclede G. L. Co., 102 Mo. 472.
(b) City of St. Louis v. Bell Telephone Co., 96 Mo. 623.
IRREGULAR GRANTS OF PRIVILEGES.

If it is claimed that a company is exercising a privilege in the streets without proper authority, the city, and not the tax payers, is the proper party to question the right. The grant of a franchise must be attacked in a direct proceeding instituted for that purpose; it cannot be impeached collaterally. The legality of the ordinance granting a franchise may be reviewed on certiorari, and it may be challenged by companies legally doing business in the streets, and also by individuals having estates therein. Where one company has the right to use the streets and another attempts to exercise the right without authority, the first company may enjoin the usurpation.

MUNICIPAL REGULATIONS.

The power of the municipality to prescribe regulations and attach conditions to the grant of a privilege to use the streets for the purposes of gas and electric light companies necessarily depends upon its charter or the statutes of the state. Municipalities are often delegated considerable latitude in these matters by the legislature. Where the municipality possesses the power, it must exercise it in a reasonable manner, and acts subjecting companies to burdens

(b) Consumers G. & E. Co. v. Congress S. Co., 15 N. Y. Supp. 624
(c) Peoples L. Co. v. Jersey City, 46 N. J. L. 297; Domestic Telegraph Co. v. Newark, 49 N. J. L. 346.
(d) Jersey City G. Co. v. Dwight, 29 N. J. Eq. 242.
and hardships, and which do not accomplish any beneficial public purpose should not be upheld.

**GAS PIPES NOT AN ADDITIONAL SERVITUDE.**

The use of streets in cities for the purpose of laying gas pipes therein has never been considered such an additional servitude or such a diversion from proper street uses as to entitle the abutting property owner, whether owner of fee of street or not, to compensation.

"While such owner may be temporarily inconvenienced during the time the street is torn up for the purpose of laying or repairing the pipes, this is one of the annoyances which the necessities of society unavoidably inflict upon the individual for the common advantage,- and it is believed that the abutting owner would not be entitled to damages for this inconvenience, except under unusual circumstances of wanton disregard of his rights of access."

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(b) No case has been found where it was expressly decided that there was no right to compensation, or where any claim for compensation was made, but numerous cases have incidentally mentioned the matter and have uniformly regarded the laying of gas pipes in the streets as a legitimate use of the same,—which does not deprive the abutting owner of any property right for which he is entitled to compensation.


(c) Fry v. Clark, 8 Ohio St. 374; Commonwealth v. Passmore, 1 Serg. & Rawle Rep. (Pa.) 217.
GAS PIPES ARE ADDITIONAL SERVITUDE IN COUNTRY ROADS:

But another rule is applicable in the use of country roads, and the owner of the soil of the highway is entitled to compensation. The public easement in country highways is less extensive than in city streets, being limited to a right of passage, with the rights incident thereto, under which may be included the right to drain, and the right to the use of the soil on the line of the road for construction and repairs. Ordinarily any other uses would be trespasses for which the abutting owner has the usual remedies. The legislature may authorize a gas company to lay pipes in these highways, and thus render its operations lawful, but such use constitutes a taking of property, and compensation must be made to the abutting owner. And a court of equity will restrain the laying of pipes as an injury of such a continuing and permanent nature, that an action at law would not be a complete remedy.

But after the pipes have been laid, and the company has expended large sums on the work, equity may refuse to interfere by injunction and may leave the abutting owner to his remedy at law.

(a) Bloomfield & Rochester N. G. Co. v. Calkins, 62 N. Y. 386.
(b) Sterling's Appeal, 111 Pa. St. 351.
(c) Kincaid v. Indianapolis N. G. Co., 124 Ind. 577.
When the poles are erected for the purpose of lighting the streets, thus making the use of the streets more safe and convenient at night, the abutting property owner cannot maintain a claim for additional compensation. Lighting the streets is one of the public uses to which a street may be properly devoted, and when the streets were taken for public use they were taken for all the purposes to which they may be properly devoted, and full compensation was then awarded to the owners. But when the poles are erected for private purposes it is believed that they impose such an additional servitude upon the street, not contemplated when the public easement was acquired, as to entitle the abutting property owner to further compensation. The decisions, in which the question of compensation has been adverted to, are not numerous, nor can they be considered as decisive.

The analogy between the use of streets for poles and wires by electric light companies, and by telegraph and telephone companies is apparent, and it may be safe to assume that the same considerations which have influenced courts in their decisions as to telegraph and telephone poles will have

(c) Tuttle v. Brush E. Co., 50 N. Y. Sup. Ct. R. 464; Metropolitan Tel. etc. Co. v. Colwell Lead Co., 67 How. Pr. 365; contra semble Western Union Tel. Co. v. Guernsey & Scudder E. L. Co., 46 Mo. App. 120.
controlling effect when the question of electric light poles is before them. It must be said that the preponderance of authority is in favor of the proposition that telegraph and telephone poles are inconsistent with proper street uses and are an additional servitude upon the fee, when it is vested in the abutting owner, or when not so vested, are a material infringement of his rights of access, light and air, which (a) entitle him to compensation.

But a contrary view has been supported with much learning and reason; it being contended that the exercise of the public easements in the streets is susceptible to expansion so as to include all new and improved uses, which are of common utility and convenience and not inconsistent with the general purposes of streets and highways as avenues of communication. The erection of telephone and telegraph poles is considered as consistent with street uses, and therefore is (b) not an invasion of any private property rights.

ELECTRIC LIGHT POLES IN COUNTRY HIGHWAYS:--

Where the soil of a country highway is owned by the


abutting property owner, an electric light company may not erect its poles thereon without making compensation to the owner.

Perhaps the sounder view is that the erection of poles and the stringing of wires for private purposes in the streets of cities, attended, as it may be, with serious damage or inconvenience to the abutting owner, is not a street use proper, and hence entitle such owner to compensation for such use or for any actual injury to his property.

**CHANGING LOCATION OF PIPES AND POLES.**

A gas company occupying a public street takes the risk of the location of its pipes, and must make, at its own cost, such changes as public necessity, convenience or security demand. In grading and improving the streets, the removal or change in location of the pipes and mains frequently becomes necessary, and the city may require the owner of the pipes to make all needful changes, even though the pipes are in the street under a valid contract. The right to do this falls within the police powers of a municipality, which cannot be surrendered, and any contract is accordingly held to be subject to these powers. The city council, and not the courts, are the judges of the necessity of the exercise of this power.

Where a contractor building a sewer for a city agrees that he

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(b) Dillon on Mun. Corp. Sec. 698a.
(c) In re Deering, 93 N. Y. 361.
(d) Roanoke Gas Co. v. City of Roanoke, 14 S. E. 665.
will bear all damages arising out of his undertaking, he is liable for loss and damage to the mains of a gas company.

Where the construction of a sewer or other public work necessitates the removal or change in location of the pipes, it is believed the company would be compelled to make all requisite changes at its own cost. But where the change would entail great expense upon the company and the sewer could be just as well constructed on either side of the pipes, it is doubtful whether the pipes could be disturbed. Although the company's franchise was accepted subject to the exercise of the police powers of the municipality, yet any exercise of this power must be reasonable and consonant with its general powers and purposes, and an ordinance is unreasonable if it be partial, unfair or oppressive in its effects, as by imposing a serious burden without an adequate cause.

The presumption is, however, that the city is proceeding in such a manner as not to unreasonably and unnecessarily interfere with the rights of the company.

A gas company is bound to know the exact location of its pipes in the streets, and to give correct information to all who are entitled to demand it. Should the company wrongly represent the location of its pipes, so as to lead, for instance, a street railway company to lay its track over them when it was seeking to avoid them, then the gas company

(a) In re Houghton, 20 Hun 395.
(c) Spokane St. Ry. Co. v. City of Spokane, 5 Wash. St. 634.
would be estopped from claiming the right to disturb the
track.

**POLES:**

Similarly, municipal authorities may compel an
electric light company to change the location of its poles
when street improvements so require. And even though the
grant to use the streets should be conferred directly by the
legislature, and not be made expressly subject to municipal
control or the assent of the local authorities, the grant
must be taken as subject to the general control of the munici-
(b)
plarity over the streets.

**PLACING WIRES UNDERGROUND.**

Electric light companies may be compelled to place
their wires beneath the surface of the streets, and such re-
quirement is not considered by the courts as annuling or des-
troying any contract rights, but as simply a regulation of
their exercise. The laws making this requirement are police
regulations, designed for the convenience and security of the
public. When subways are constructed and are ready for the
reception of the wires, and a company fails to remove its
wires which are strung from poles in the street, after a rea-
sonable opportunity has been afforded for their removal, the
city may abate the poles and wires as a nuisance, doing no
unnecessary damage. And companies may be assessed to pay the

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(c) People v. Squire, 107 N. Y. 593.
(d) American Rapid Tel. Co. v. Jacob Hess, 125 N. Y. 641.
salaries and expenses of a Board of Commissioners having charge of the electrical subways constructed for their purposes, and such assessment is not unconstitutional as depriving them of their property without due process of law.


NEGLIGENCE.

Gas light and electric light companies having within their control agencies which may become highly dangerous to the public, are required to use in the management and prosecution of their business a degree of care proportionate to the dangers involved. The standard of care is reasonable care under the circumstances, which is usually a question of fact for the jury. Where the facts are not disputed, and reasonable men could draw but one inference from the evidence, the question of negligence should be withdrawn from the jury and decided by the court.

NEGLIGENCE OF GAS COMPANIES:

Ordinary illuminating gas is highly inflamable: it becomes dangerously explosive when mixed in certain proportions with atmospheric air, and when inhaled by human beings produces sickness or even death. Therefore a company undertaking to use public streets for the purpose of conveying gas to its customers is bound to exercise a degree of care commensurate with the hazards inseparably concomitant; it must provide pipes of sufficient strength and imperviability, must lay them with proper skill and must exercise a watchful

care in their maintenance and repair. It is bound to use due care not only on the part of itself and its servants, but also due care in preventing and repairing injuries to its pipes arising from the careless or wrongful meddling or interference of others. Thus where a city in building a sewer displaces the earth around a previously laid gas pipe causing it to leak, it was held that although the gas company could not prevent the operations of the city, yet it was bound to see that the earth around its pipes was properly restored and that its pipes were sufficiently supported, and if the pipes were injured it was the company's duty to make all necessary repairs with reasonable diligence. Negligence is imputed to any dereliction in these particulars. But where the company has no knowledge of the city's operations, which occasion a leak in its mains, the mere facts that a pipe was broken and that gas escaped are not of themselves sufficient to establish the company's liability, although it is evidence of neglect. If the company have no notice of the leak, and is otherwise without fault, it is not liable until the existence of the leak is brought to its knowledge, or it might have discovered the defect by the exercise of due diligence, and it has had a reasonable time to make the necessary repairs; to

(b) Brown v. N. Y. G. L. Co., Anthon's N. P. Cases, 351.
fix a lack of this diligence, it is competent to show that (a) passers-by noticed the escaping gas. Where gas escapes from a main in the streets, and finds entrance into a house through a sewer, and in its passage takes up poisonous sewer gases, the escape of the gas from the main is the proximate cause of any injury sustained by the inhalation of the combined gases.

The escape of gas from a street main raises no presumption of negligence on the part of the company. The one alleging negligence must prove it. Yet where one is injured by inhaling gas which escaped from a leak in a street main, and the attending circumstances conclusively negative contributory negligence, there is enough evidence of want of proper care on the part of the gas company to make it responsible on the ground that it is bound to conduct its gas in a proper manner, and the fact that gas escaped is prima facie evidence of some neglect on its part.

**EVIDENCE OF NEGLIGENCE:**

Evidence that the gas company was negligent in permitting gas to escape into houses on one side of a street is not admissible to prove negligence as to its escape into houses on the other side of the street, but where it was alleged that gas escaped into a green-house by passing through a sewer connected with a public sewer, evidence of gas in

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(e) Emerson v. Lowell G. L. Co., 6 Allen 147.
other green-houses connected with the same public sewer was (a) admitted. It is proper to show that before the escape of the gas into a house all members of the family residing therein were in good health, and that afterwards they all became ill, but not of the sickness of other persons following the escape of gas into other houses.

**MAINTAINING AND REPAIRING PIPES:**

A company is bound to use reasonable care in maintaining and repairing its pipes, and should have a sufficient force of servants available for that purpose, but it is not bound to anticipate any extraordinary demand upon its resources, and provide for exigencies which prudent men would not foresee. It is always proper for the company to show its system of doing business and the precautions taken to discover and repair leaks.

**EXCAVATIONS:**

A gas company digging up the public streets for the purpose of laying its pipes is bound to take reasonable care to protect the public from injury during the progress of the work. The excavations should be properly guarded by barriers and signal lights at night, and when the pipes are laid, the company should restore the street to a safe condition; it cannot escape liability for injuries occasioned by the impro-

(a) *Butcher v. Providence G. Co.*, 12 R. I. 149.
(b) *Hunt et al v. Lowell G. L. Co.*, 1 Allen 343.
(c) *Emerson v. Lowell G. L. Co.*, 6 Allen 147.
per filling of its trenches or other negligent performance of
the work, by showing that it contracted with others to do the
(a) work, but where the work is done without competent authority
from the proper officers of the company, it is not answer-
(b) able for injuries resulting from its negligent performance.

CONTRIBUTORY NEGLIGENCE:

Where the plaintiff has been guilty of contributory
negligence he cannot recover damages from the gas company.
It is contributory negligence for one to remain in his resi-
dence when he knows that gas is escaping into it, and he has
(c) an opportunity to secure another house. And where a civil
engineer employed about the construction of a public sewer,
knowing that there was a leak in a gas main caused by the
work on the sewer, and of the probability of the gas escaping
into the sewer in dangerous quantities, entered the sewer
with a light, and an explosion followed, there was such con-
tributory negligence upon his part as to preclude the recov-
ery of any damages from the gas company.

NEGLIGENCE - ELECTRIC LIGHT COMPANIES:

An electric light company erecting its poles and
stringing its wires in the streets of a city must exercise
reasonable care in their construction and maintenance, and
must exercise the same degree of care in preventing mischief
by the dangerous electrical currents flowing through the wires.

(b) Noblesville G. & I. Co. v. Lochn, 124 Ind. 79.
(c) Hunt v. Lowell G. L. Co., 1 Allen 343; Holly v. Boston
   G. L. Co., 8 Gray 123.
Reasonable care, in this connection, means a degree of care commensurate with the dangers involved. The instrumentalities employed have a great capacity for harm, to both life and property, and consequently very great skill and circumspection must be constantly exerted in their control and operation. The poles should be stout and firmly set, the cross arms strong and well secured, and wires should be of good material, and safely insulated in all places where danger may be reasonably apprehended. The poles should be guyed where necessary for stability, and all details of construction carefully observed, for companies are bound to use the streets without subjecting travelers to danger or injury, so far as the employment of suitable and safe appliances, and watchful inspection will prevent. And while it is obligated to a high degree of care and diligence, it is not bound to take every precaution that fertile imagination or "ingenious conjecture:" might suggest. It is not bound to use perfect apparatus, nor is it an insurer of the safety of those using the streets. If it provide and maintains reasonably safe and strong poles and wires it has discharged its duty. It is only bound to anticipate and guard against those contingencies which the law supposes to be in the contemplation of practical and prudent men. Therefore a company is not liable for injury oc-

(c) Haynes v. Raleigh C. Co., 114 N. C. 203.
(d) U. S. Illuminating Co. v. Grant, 55 Ind. 230.
casioned by a falling pole, succumbing to the stress of an extraordinary snow storm, nor of a cyclone, or to the shock of the impact of a runaway team.

In erecting poles and wires, the safety of travelers on the street must not be neglected. Thus careless blasting in setting poles will render company liable to those injured. And wires should not be allowed to remain on sidewalks where they may trip passers-by. One walking along the sidewalk has a right to presume that it is free from obstruction, until attention is called thereto. And one becoming entangled in the wires so negligently placed, is not guilty of contributory negligence, although the accident occurs in the day time.

**UNUSED WIRES:**

Unused wires should not be permitted to remain in streets, and especially should the connections with premises of others be effectually broken. Accidental contact with live wires may animate them with destructive energy, or lightning may be thus conducted to another's property, and the company owning the wires is responsible for any ensuing damages. Such occurrence is a probability which might have been reasonably foreseen, and the fact that the primary cause of the injury, in the case of lightning, is an act of God, furnishes no defence - the company's negligence in leaving

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(b) Mitchell v. Charleston L. & P. Co., 22 S. F. 767. (S. C. 1895),
(c) Allen v. Atlantic etc. Tel. Co., 21 Hun. 22.
(e) Frush E. L. Co. v. Kelly, 126 Ind. 220.
the wires where they might do damage, is the proximate cause
of the injury.

Unused wires should not be allowed to hang from
poles, although disconnected. The company owning the wires
is bound to anticipate the probabilities of the acts of med-
dlers, boys and irresponsible parties, and if, through their
interference or by accident, the wires should become charged
by contact with a live wire, and injury result, the company
is liable for neglecting to look after the wires and keep
them harmless.

**SAGGING AND FALLEN WIRES:**

The wires should be strung and maintained under
sufficient tension to prevent them from sagging so as to ob-
struct the street, or to come in contact with the wires of
other companies. It is negligence for a company to allow a
wire, otherwise harmless, which has fallen upon the heavily
charged wire of another company, to remain there after its
dangerous position could have been discovered by the exercise
of reasonable care; and where the condition of the wires is
so apparent as to challenge the attention of a prudent man
employed by either of the companies, both are liable for any
resultant damages. A traveller who is injured by coming in
contact during an electric storm with a wire negligently per-
mitted to remain suspended across a street a few feet above

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(a) Jackson v. Wisconsin Tel. Co., 88 Wis. 243.
(c) Electric Ry. Co. v. Shelton, 89 Tenn. 421.
the ground, is entitled to recover from the company owning the wire, although the dangerous condition of the wire may be due to electricity attracted from the atmosphere, for the (a) electricity would have been harmless except for the wire.

**GUY WIRES - HANGING WIRES:**

A company is bound to keep its guy wires in place: such a wire detached from its anchorage and hanging in the street where it is liable to be touched is *prima facie* evidence of neglect, and the burden of showing due care is upon (b) the company. A person passing along the street does not cease to be a traveller, if he stops to remove a dangling wire which obstructs the way,— even though it constitutes no serious impediment to his passage. And if he be injured by an electric shock, both the city and the company are liable. (c)

**INSULATION:**

It is negligence for an electric company to fail to keep its wires, which are charged so as to be dangerous to life, properly insulated, especially where the public is (d) likely to come in contact with them. Such wires without safe (e) insulation are public nuisances, and the city may abate them. Failure to observe a city ordinance which requires that all (f) splices should be safely insulated is negligence.

**UNSAFE CONDITION OF WIRES:**

If the unsafe condition of a company's wires is due

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(b) Haynes v. Raleigh G. Co., 19 S. E. 344.
(c) Bourget v. City of Cambridge, 156 Mass. 391.
(e) U. S. Illuminating Co. v. Grant, 55 Hun 222.
to causes for which the company is not responsible, it is
negligence to permit such condition to continue after notice
has been received and a reasonable time to remove the danger
(a)
has passed.

**PUNITIVE DAMAGES:**

When a company knows that its wires are grounded,

it seems that the continued generation of electricity may

subject it to punitive damages, if a traveller upon a street

sustains injury by reason of the defective condition of the

(b)
wires.

**JUDICIAL NOTICE:**

Courts take judicial notice of the dangerous char-
acter of wires sufficiently charged with electricity to sub-
serve the purposes of city illumination; of the fact that the
erection and regulation of the distributive apparatus of a
company require that its servants ascend the poles and go
among the wires: and of the dangers apt to arise from the
(c)
proximity of the wires of different companies.

**CONFLICTING RIGHTS.**

Cases arise where the right of an electric light
company to use the streets comes in conflict with the rights
of telegraph, telephone and other electric light companies,
claiming similar rights. The electric light wires conducting
powerful currents are neither desirable nor safe neighbors

(a) Nichols v. City of Minneapolis, 33 Minn. 430.
(c) Consolidated R. L. Co. v. Peoples etc. Co., 94 Ala. 372.
for the telegraph or telephone wires, carrying weak and harmless currents. Electric light wires in close proximity to telegraph and telephone wires may induce currents in them which may injuriously affect, if not wholly prevent, their operations. Sagging and broken electric light wires may cause contacts and crosses, imparting to the telegraph and telephone wires an energy destructive to life and property.

The exclusiveness so often and so obstinately manifested by one company, when another proposes to invade its neighborhood, has therefore other grounds than mere boorishness. To settle the contests between the disputing companies, the courts invoke the maxim, "Prior tempore, prior jure".

Thus the rights of an electric light company which has first occupied a street, are superior to those of a telephone company seeking to use the same street, and the latter cannot enjoin the electric light company from erecting its poles and wires, but if the telegraph or telephone company was first in point of time, and it appears that the efficient operation of its wires will be impaired by the proximity of the electric light wires about to be erected, the electric light company must yield. And an electric light company will be restrained from erecting and maintaining its poles and wires in such manner as to interfere with those already erected by another electric light company under lawful author-

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ity from the municipality for the company first occupying the streets, by its expenditures of money on the faith of its license acquired a vested right therein, which the municipality could not impair by a subsequent grant, and any subsequent grant is subordinate to and must not infringe the first grant. While the first company should not be molested by new-comers, yet it cannot sustain a claim for more space than is reasonably required for the safe and successful operation of its lines. If a company, without exclusive right, unnecessarily occupies both sides of a street for the purpose of excluding rival companies, it clearly abuses its privilege, yet this abuse will not justify a rival in erecting its poles and stringing its wires in such proximity to the first company's lines as might lead to a destruction of life or property.

And it seems that if each of two or more companies has the right to erect poles and string wires in the streets of a city, that the rights of the company which first begins and diligently prosecutes the construction of its lines upon a street or system of streets, are superior to those of the others, and may even extend to the exclusion of the other companies, should the full enjoyment of its rights so require.

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(b) Consolidated E. L. Co. v. Peoples etc. Co., 94 Ala. 372.
JOINT USE OF POLES.

It is often highly convenient for one company to attach its wires to the poles of another. An arrangement of this sort may effect a material saving to both companies in construction and repair accounts; one pole serving where otherwise two would be required, and such arrangement is advantageous to the public, in that it lessens the number of poles in the streets. But it is clear that such attachments cannot be rightfully made without the consent of the owner of the poles. If a company attaches its wires to the poles of another company without the latter's permission, it is a trespasser, and the company owning the poles may remove the wires as a nuisance. The trespassing company does not, however, thereby forfeit its property in the wires, and if the company removing them carries them away, it is liable for their conversion.

Sometimes a municipality, when conferring the right to erect poles in the streets, reserves the power to grant the use of the poles to others upon payment of a proportionate part of their cost or upon other equitable terms. This is a prudent stipulation, and when the power is opportunely exercised cannot be otherwise than beneficial to the public. But the municipality should exercise the reserved right in a reasonable manner, and should make its subsequent grants sub-

(a) Electric Power Co. v. Metropolitan Tel. Co., 75 Hun 68.
ject to such limitations and regulations as will prevent the undue abridgement of the first company's privileges. Otherwise the subsequent grant will be abortive and void.

DUTY TO LICENSEE:

When a company permits another to use its poles, the wires of both companies being charged with dangerous currents, the company owning the poles is bound to keep its wires and poles, so far as is practicable, in a safe condition at all places where the servants of the licensee company are expressly or impliedly authorized to go in the performance of their ordinary duties pertaining to their employer's wires. But a company is not liable for injuries sustained by the employee of another company who climbs its poles without license. Nor can such employee recover from a third company whose negligence has rendered the pole unsafe. He becomes a trespasser by leaving his place in the street, and climbs the pole at his peril.

INJURIES FROM IMPLIED LICENSEE'S WIRES:

When a company fastens its wires to the poles of another without the latter's affirmative consent, the relation of licensor and implied licensee may arise, but such relation will not render the owner of the poles liable for injuries to travellers caused by the negligence of the other company in respect to its wires.

(d) Hohnes v. Union Tel. etc. Co., 16 N. Y. Supp. 563.
UNAUTHORIZED ATTACHMENTS TO PRIVATE PROPERTY.

A company attaching its wires to private premises without the consent of the owner is bound to indemnify him for all damages which he may be compelled to pay to third parties for injuries sustained by reason of the attachments. But if one acquisces for years in the continuance of poles and wires in a private alley appurtenant to his lot, he cannot hold the company responsible for a loss by fire merely because the poles and wires hinder the firemen in their efforts to extinguish the fire.

The statutes of a number of the states provide that when poles or wires of electric companies are placed upon, attached to, or are erected so as to extend over any land or buildings, that no lapse of time shall raise a presumption of a grant or justify a prescriptive right in favor of the company.

SHADE TREES.

In erecting poles and wires it is often necessary to cut away a portion of the limbs and foliage of trees growing in or overhanging the street. Companies lawfully occupying streets undoubtedly have the right to do this, and it is a matter often regulated by statute. The right should be carefully exercised, and all unnecessary trimming or mutilation should be scrupulously avoided, and if the poles and

(b) Chaffee v. Tel. & Tel. Con. Co., 77 Mich. 625.
wires can be placed elsewhere without inconvenience, the
trees should be left untouched. For any abuse of this right
(a) companies are held strictly accountable. So if shade trees
are killed by gas negligently permitted to escape from a main
(b) in the street, the gas company is liable in damages.

**LIABILITY FOR NUISANCES - CITY AND COMPANIES.**

The duty of maintaining the streets in a safe condition rests primarily upon the municipality, and this is an
(c) obligation which it cannot evade, suspend or cast off. The
municipality cannot, therefore, place a dangerous obstruction
to travel in its streets, or suffer it to be done by others,
without liability; and where it authorizes poles and wires to
be erected in the streets by an electric light company, each
and both are liable for damages to travellers from such ob-
(d) struction. Where a statute authorizes poles to be set in the
streets, but so as not to incommode public travel, a company
undertaking to use such privilege must use reasonable care in
selecting locations for its poles. If such care is used, the
company is not liable for accidents occurring under extraordi-
(e) nary circumstances. In Massachusetts, it has been held,
that where the poles are set in places designated by the
selectmen of the town, the town is not liable for injuries

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(c) II Dillon on Mun. Corp. Sec. 1027.
City of Cambridge, 156 Mass. 391; but see Borough of Sus-
sustained by a traveller, it being conclusively presumed that
the poles offer no obstruction to the use of the streets.

But ordinarily the municipality is liable for injuries re-
ceived by travellers, if the position of the pole causing the
injury render it a nuisance and dangerous to the public, and
if the pole is set with the consent of the municipality and
under its direction it cannot recover indemnity from the own-
or of the pole. The municipality and the company are in
para delicto, and the circumstances do not constitute an ex-
ception to the rule denying contribution or indemnity to a
joint wrong doer. These exceptions are of two classes:

"First, Where the party claiming indemnity has not been
guilty of any fault except technically or constructively, as
when an innocent master is held to be liable for the torts of
his servant acting within the scope of his employment.

Second, Where both parties have been in fault but not in
the same fault, and the fault of him from whom the indemnity
is claimed was the primary and efficient cause of the injury.
Very familiar illustrations of the second class are found in
cases of recovery against municipalities for obstructions to
the highway caused by private persons; the fault of the lat-
ter is the creation of the nuisance; that of the former to
remove it in the exercise of its duty to care for the safe
condition of the public streets; the first was a positive
tort and the efficient cause of the injury complained of, the
latter the negative tort, the failure to act upon notice ex-

(a) Young v. Inhabitants of Yarmouth, 9 Gray 386.
Where a gas company has the exclusive right to lay pipes in the streets, the right extends to lateral as well as the main pipes, and to the placing of gas boxes, and the company is responsible for defects in these, although paid for by the consumer. A gas box projecting above the sidewalk is such a defect in the street as will render the city liable for injuries sustained by one tripping over the same, although the gas company may be compelled to indemnify the city.

In order that one may recover damages from a municipality for injuries sustained by the unsafe condition of the street, it is incumbent upon him to show that either the city had actual notice of the danger or defect, or that the want of notice or knowledge is attributable to its negligence. If the action against the city fail, the party injured is not thereby barred of an action against the one responsible for the nuisance.

ACTION OVER:

When a municipality has been compelled to pay damages for injuries sustained in consequence of the unsafe condition of the street, due to the occupation, or operation therein of a gas or electric light company, it has a remedy over against the company whose wrongful act or conduct rendered the street unsafe.

(c) Loan v. City of Boston, 106 Mass. 450.
(e) II Dillon on Mun. Corp. Sec. 1034.
unsafe, unless the corporation was itself a wrongdoer as between the defendant and itself. Such company is concluded by the judgment against the corporation for its act or negligence, if it knew that the suit was pending, and could have defended it, although it had no express notice to so defend, but it is not estopped to show that it was under no obligation to keep the street in a safe condition, or that the injury did not result from its act or neglect, or that the corporation was also at fault. And the verdict and judgment are conclusive upon the party in original default as to the facts:

(1.) That the street was defective; (2) that the person was injured there while using due care, and (3) of the amount of damage by the injury; but not of company's liability to keep the place in repair; nor (2) of its having neglected to do so, nor (3) of its neglect or failure having been the sole cause of the injury. But the party in default will not be permitted to prove that in making a dangerous excavation it was guilty of no negligence, or that it properly guarded and covered the same in leaving off work on the night of the injury. When the company originally in default is duly notified to defend, the city may recover attorney's fees, in addition to the costs, and damages paid, but should the city appeal the case without its request, the company is not liable for the costs of the appeal.

(a) II Dillon, Mun. Corp. Sec. 1035; Chicago v. Robbins, 2 Black. 418.
(b) Robbins v. City of Chicago, 4 Wall. 657.
(c) City of Boston v. Worthington, 10 Gray 496.
(d) City of Portland v. Richardson, 54 Me. 46.
(f) Ottumwa v. Parks, 43 Ia. 119.
INJURIES TO POLES AND PIPES IN STREETS.

Many states have laws on their statute books which make the theft of, or unlawful interference with, the property of gas and electric light companies, in the streets, serious offences. But in the case of injury to or interference with, such property, any defense which might have been interposed against the city may be interposed against the owner of the property.

TAXATION.

PERSONALTY OR REALTY – GAS PIPES:

The statutes of many states prescribe the manner in which the pipes of gas companies laid in the streets shall be assessed for purposes of taxation; that is, whether they shall be considered as realty or personalty. In the absence of statute courts have reached directly opposite conclusions. One view is that the pipes and mains so situated are appurtenances to the land upon which the gas works are situated, and hence are realty; or fixtures; or machinery forming part of one great integral machine by which gas is manufactured and distributed.

The other view is that the pipes do not become a part of the realty, nor the property of the city in whose

(a) Roche v. Milwaukee G. L. Co., 5 Wis. 55.
(c) Providence G. Co. v. Thurber, 2 R. I. 15.
streets they are laid, but they are personalty and remain the
property of the company. They cannot be considered as real
(b) estate as they are not on owner's land, nor are they fix-
tures.

POLES AND WIRES:-

The taxation of poles and wires, in streets, like
that of gas pipes, is frequently regulated by statute,- many,
if not all of the statutes direct that the poles and wires
shall be assessed as personalty. No adjudications of the
matter upon common law principles have been found. The poles
and wires have, however, been adjudged, under the doctrine of
constructive annexation, to be fixtures, belonging to the
electric light plant, and thus subject to liens attaching to
(c) real estate.

MUNICIPAL TAX ON POLES:-

A city may impose a license fee upon the poles
erected in its streets for the purpose of defraying the ex-
penses of inspecting them. This is a legitimate exercise of
(d) its police powers, designed for the safety of the public.
And it may require the poles to be numbered and marked with
(e) the initials of the owner. But the license must be reasonable

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(a) Memphis G. L. Co. v. State, 6 Coldwell 310.
(b) People v. Board of Assessors, 39 N. Y. 87.
But the mains, tanks and service pipes of a foreign gas
company are taxable as real estate under New York statute,
People v. Martin, 48 Hun 193.
(c) Badger Lumber Co. v. Marion etc. P. Co., 48 Kas. 182;
U. T. Co. v. City of Philadelphia, 12 At. (Penn.)144;
City of Allentown v. W. U. T. Co., 148 Pa. St. 117; City
of Chester v. P. R. & P. Co., 148 Pa. St. 120; contra,-
City of New Orleans v. G. S. T. & T. Co., 3 So. Rep. 533,
La. 1888.
in amount and not greater than the actual cost of the inspection, and it is not permissible to charge a fee in excess of such cost in order to accumulate a fund for the purpose of satisfying possible damages for which the city may become liable by reason of the presence of the poles in the streets. Yet it is valid for a city, with an exceptionally liberal charter in regard to the control of the streets, to levy an annual charge upon the poles in the streets, which is in the nature of a rental for the portions of the streets occupied.
